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Supreme Court of the United States

OCTOBER TERM, 1934

No. 556

W. B. WORTHEN COMPANY, BANKERS, AS TRUSTEE, EX REL., THE BOARD OF COMMISSIONERS OF STREET IMPROVEMENT DISTRICT No. 513 OF THE CITY OF LITTLE ROCK, ARKANSAS, AND C. S. SMART AND W. H. MILLER, AS BONDHOLDERS ..... *Appellants,*

v.

COBURN C. KAVANAUGH ..... *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLANTS

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v.

COBURN C. KAVANAUGH ..... *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

Street Improvement District No. 513 of Little Rock, Arkansas, was duly organized in 1930 under Chapter 89 of Crawford & Moses' Digest of the Statutes of Arkansas and the amendments thereto, including Act 64 of the Acts of Arkansas of 1929. On July 1, 1930, it issued and sold $31,000 of serial negotiable coupon bonds, all payable to bearer.

To secure their payment, it duly executed a pledge and mortgage of its assessment of benefits to appellant, W. B. Worthen Company, Bankers, as trustee for the holders of the bonds, by which it pledged, mortgaged, assigned, transferred and set over to the trustee its entire assessment of benefits and delivered to the trustee, as mortgagee and pledgee, a certified copy of the assessment giving in detail the amount of benefits assessed against each piece of real property within the district (R. 3).

Improvement districts created under the Arkansas laws differ from districts in most other states in that the assessments are not collected by executive distraint but by suit in equity. The assessments are made a lien on the lands, and if not paid when due suit to foreclose must be brought.

At the time the bonds of this district were issued and sold, the following laws found in Crawford & Moses' Digest were in effect providing penalties for failure to pay the assessments promptly and speedy proceedings for foreclosure:

The property owners had only thirty days in which to pay their assessments after the date of notice required to be published by the collector (Section 5671 of Crawford & Moses' Digest), and if not paid within that time the collector was required to add a penalty of twenty per cent and make immediate return of delinquents to the Board of Commissioners (Section 5673). Foreclosure suit then had to be filed immediately to enforce collection (Section 5674). In case of personal service answer was required to be made in five days (Section 5678). Upon default, a decree had to be

rendered against the property for the amount of the assessment, twenty per cent penalty, costs and attorney's fees (Section 5678), and to provide for sale upon twenty days' notice if payment were not made in ten days (Section 5684). The property owner had two years in which to redeem by payment of the purchase price and ten per cent interest per annum (Section 5644 as amended by Section 2 of Act 359 of 1925, as contended by us). The purchaser at the sale had the right to possession pending redemption without accountability for rents (Section 5642). In case of appeal the transcript had to be filed in the Supreme Court within twenty days (Section 5687), and the court was required to advance the case (Section 5686). (Under the practice of the Supreme Court, a hearing could be had in three weeks.)

The 1933 Arkansas Legislature passed Acts 278, 252 and 129 making the following important changes in the above laws:

Under Act 278, the collector cannot file the delinquent list until ninety days after the date of the notice, a penalty of only three per cent can be added, and the delinquent list cannot be returned until another ninety days. Foreclosure suit cannot be brought until after the delinquent list is filed (180 days or six months after the date of the notice.) The property owner has six months after service in which to answer before decree can be taken. The decree must provide twelve months for payment and six months' notice of sale if payment is not made. The law requiring the appeal to be taken in twenty days and for the Supreme Court to advance the case is repealed. (Under the general law, six months is given in which to appeal and under the rules of

the court, it would be seventy-seven days before the appeal could be heard, even if the court were up with its docket.)

Act 252 amends the old law to provide four years to redeem by the payment of the purchase price and only six per cent interest per annum.

Act 129 repeals the old law giving the purchaser at the sale the right to possession without accountability for rents pending redemption.

(The above sections of Crawford & Moses' Digest, Act 359 of 1925, and Acts 278, 252 and 129 of 1933, are printed in full in the Appendix.)

The commissioners of the district having failed to bring suit to foreclose the lien of delinquent assessments, this suit was brought on July 26, 1934, in the chancery court of Pulaski County, Arkansas, by the appellant trustee, as authorized by the pledge (R. 9), to enforce the collection of assessments due in 1932 and 1933 which had been duly returned as delinquent. The appellants, Smart and Miller, the holders of bonds and interest coupons in default, joined in the suit on behalf of themselves and of other bond and coupon holders who held unpaid bonds and coupons, as the real parties in interest (R. 4). A number of delinquent property owners, including the appellee, Coburn C. Kavanaugh, were made defendants, and duly served with summons. Kavanaugh filed an answer promptly, and a final decree was entered against him only.

The appellants contended that they were entitled to a decree charging the appellee's property as delinquent with the amount of his assessment due together with a penalty

of 20 per cent and a reasonable attorney's fee and costs, as authorized by Sections 5673 and 5678 of Crawford & Moses' Digest; that the decree should also provide that the property be condemned and sold upon 20 days' notice if payment of the amount adjudged to be due were not made in 10 days, as required by Section 5684 of said Digest; that upon the approval of the sale, the commissioner appointed by the court to make the sale execute and deliver to the purchaser a certificate of purchase, as required by Section 5691 of said Digest; that if not redeemed within two years from date of the sale by the payment of the purchase price and 10 per cent interest, the commissioner execute and deliver a deed to the purchaser or his assignee, as authorized by Section 5692 of said Digest and also by Section 5644 as amended by Section 2 of Act 359 of 1925, giving two years in which to redeem; that immediately upon the delivery of the certificate of purchase, the purchaser or his assignee have possession of the property pending the redemption without accountability for rents if redemption is made, as authorized by Section 5642 of said Digest; that all of said sections of the Digest were in force at the time the bonds were issued and at the time they were sold to the present holders thereof, who purchased the same in good faith before maturity in reliance upon the provisions of said statutes as security (R. 4, 5).

The appellee in his answer admitted that the appellants were entitled to a decree condemning his property to be sold for the amount of his delinquent assessments. He contended, however, that Section 5673 authorizing a 20 per cent penalty had been amended by Section 1 of Act 278 of the Acts of Arkansas of 1933 to provide for a penalty of only

3 per cent; that Section 5678 authorizing the attorney's fee had been repealed by Section 2 of said act; that Section 5684 providing for payment in ten days and for twenty days' notice of sale had been amended by Section 4 of said act to provide for payment in twelve months and for six months' notice of sale; that Section 2 of Act 359 of 1925 giving two years in which to redeem and Section 5644 of the said Digest providing that 10 per cent interest be paid on redemption had been amended by Act 252 of the Acts of Arkansas of 1933 to provide four years for redemption and the payment of only 6 per cent interest; and that Section 5642 of the Digest giving the purchaser the right to possession without accountability for rents pending redemption had been repealed by Act 129 of the Acts of Arkansas of 1933 (R. 11, 12).

The appellants contended that the remedies given by the laws relied on by them became a part of the contract for the sale and purchase of the bonds, and therefore Acts 278, 252 and 129, which purported to amend or repeal them so as to deprive the bond holders of any effective remedy for the enforcement of their rights, were void as to the bonds of the district, which were sold before these acts were adopted, because in contravention of Article I, Section 10, of the Constitution of the United States which forbids the passage of any law impairing the obligation of contracts, and the Fourteenth Amendment to the Constitution of the United States, which forbids any State to deprive any person of his property without due process of law (R. 12, 13).

The trial court sustained the contentions of the appellee and entered a decree in accordance therewith, thus upholding the constitutionality of Acts 278, 252 and 129 of

1933 (R. 13-15). The appellants appealed to the Supreme Court of Arkansas and again raised the constitutional questions. That court, by a four to three decision, affirmed the decree of the lower court, holding that the acts did not contravene the said provisions of the Federal Constitution.

Two majority opinions were written: one by Judge Humphreys (which will be referred to hereafter as the "principal opinion") to which three judges dissented, and a concurring opinion by Chief Justice Johnson which was concurred in by the judges who did not dissent to the principal opinion (R. 15-19). Both opinions are reported in the Advance Sheets of 75 S. W. (2d), No. 1, p. 62, of November 20, 1934.

SPECIFICATION OF ASSIGNED ERRORS

Acts 278, 252 and 129 of the Arkansas Legislature of 1933, as construed by the Supreme Court of Arkansas in this case, are given an unconstitutional retrospective effect, taking away the vested rights of appellants Smart and Miller and other holders of bonds of Improvement District No. 513 of Little Rock to effective remedies for the enforcement of collections of assessments in the district given by the laws in force when the contract for the sale and purchase of the bonds was made, and thereby impairing the obligations of the contract for the purchase and sale of the bonds in violation of Art. I, Sec. 10, of the Federal Constitution, and taking their property without due process, contrary to the Fourteenth Amendment of the Federal Constitution.

ARGUMENT

I.

THE QUESTION INVOLVED

This appeal involves the constitutionality of Acts 278, 252 and 129 of the Arkansas Legislature of 1933. These acts amend certain laws and repeal others which were in force at the time the bonds of this district were issued and sold, affecting remedies to enforce the collection of assessments in improvement districts in cities and towns. We contend that they are in contravention of the contract clause of Article I, Section 10, and of the due process provisions of the Fourteenth Amendment to the Federal Constitution.

This case is of tremendous importance in Arkansas because its decision will affect the collection of assessments in improvement districts in cities and towns of the state, which sold bonds before these Acts were passed to the amount of more than fifteen millions of dollars, and also because it will decide the constitutionality of similar laws affecting the collection of assessments in levee and drainage districts which sold bonds before the laws were passed to the amount of more than one hundred millions of dollars. As a result of these new laws many property owners who are fully able have refused to pay their assessments as they became due since they can take advantage of the long extension given by these laws without incurring the penalties given by the old laws. The natural result of this has been that many improvement districts with ample but small assessments on valuable property have defaulted on their bonds, which have never done so before. This has rendered practically valueless for sale or collateral their bonds which are

held by innocent purchasers all over the United States. These laws have also reduced the value of bonds of districts which have not defaulted.

II.

THE CHANGES IN THE REMEDIES ARE SUBSTANTIAL

A summary of the changes made by Acts 278, 252 and 129 is as follows:

The time to file suit to enforce collection of delinquent assessments is extended from *thirty days* after they become due to *six months*, the time to answer from *five days* to *six months*, the time for payment of the amount adjudged to be due by the decree from *ten days* to *twelve months*, and the notice of sale, if payment is not made, from *twenty days* to *six months*. The time in which the sale can be had is thus extended from *sixty-five days* to *two years and six months*.

The penalty for failure to pay assessments when due is reduced from *twenty* per cent to *three* per cent and the period for redemption after sale is extended from *two* years (as contended by us) to *four* years. The interest to be paid on the purchase price on redemption is reduced from *ten* per cent to *six* per cent and the right of the purchaser to possession pending redemption *without accountability for rents* is taken away.

The time to appeal is extended from *twenty days* to *six months*. The right to have the appeal advanced for hearing and heard in *three weeks* is taken away, and a hearing cannot be had for at least *seventy-seven days* after the appeal is filed, even if the court were up with its docket.

Thus under the old laws, the property owner could delay payment of assessments for only sixty-five days before

sale, but there was a strong incentive for him not to take advantage of even this short period since he would incur a penalty of twenty per cent, attorneys' fees and costs of suit. Even if he were willing to pay this high premium for the short delay, there was the incentive for him to buy at the sale and not take advantage of the right of redemption since he would lose possession and the rents and profits pending redemption, and would have to pay ten per cent interest per annum on the purchase price when he redeemed. There was also an incentive for a cash purchaser to buy at the sale as he would have the rents and profits pending redemption. The owner could not further delay payment very long even by an appeal to the Supreme Court since he had to take his appeal in twenty days and the court had to advance it and, under the practice of the Supreme Court, it would be set for hearing in three weeks.

Under the new laws, a property owner can delay payment for two years and six months before sale at a penalty of only three per cent and nominal costs. If he should appeal to the Supreme Court, he can take the full six months allowed by general law and it would be 77 days, under the rules of the court, before his case could be submitted, even if the court were up with its docket. This would give him another delay of eight months and seventeen days. The right to redemption is extended from two years, as we contend, to four years on the payment of only six per cent interest per annum on the purchase price instead of ten per cent. The right to possession in the purchaser at the sale without accountability for rents and profits is taken away, and therefore the incentive to buy at the sale is removed. Why should the property owner pay his assess-

ment promptly when he can get the use of the money for two years and six months by payment of a penalty of only three per cent before a sale can be had, and can then keep possession of his property for four years more, and redeem by paying the purchase price and only six per cent interest per annum?

The bonds of this district were dated July 1, 1930 (R. 6), and matured serially from January 1, 1931, to January 1, 1945 (R. 6). The assessments were payable without the twenty per cent penalty up to about August 8th of each year (R. 4). The maturities each year, therefore, were to be paid from assessments finally due about five months earlier, the collection of which could be enforced in 65 days, or two months and five days. The bonds had value and were salable because the purchaser was solemnly assured by the statutes of the State in force when they were sold that collection of the assessments could reasonably be expected to be enforced in sufficient time to pay them at maturity. If the collection could not have been enforced for two and one-half years, as these Acts provide, they would have been worthless and could never have been sold.

No reasonable person could deny that these three Acts substantially change the remedies given under the old laws.

III.

STATUTES MAKING SUBSTANTIAL CHANGES IN REMEDIES CONFLICT WITH THE CONTRACT AND DUE PROCESS CLAUSES

Acts 278, 252 and 129, by making substantial changes in the remedies for the enforcement of the collection of the assessments given by the laws in force when the bonds were

issued and sold, conflict with the contract clause of Article I, Section 10, of the Federal Constitution.

It is well settled that the remedies for the enforcement of a contract given by the laws in force when it is made enter into and become a part of the contract, and any substantial change cannot be made under the contract clause unless another equally efficient remedy is provided.

In *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, this Court said:

> "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void."

In *Bank* v. *Sharp*, 6 How. 301, this Court said:

> "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force."

In *Edwards* v. *Kearzey*, 96 U. S. 595, 607, it was held:

> "The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void."

In *Louisiana* v. *New Orleans*, 102 U. S. 203, it was said:

> "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, *qui cito dat bis dat*—he who gives quickly gives twice—has its counterpart in a maxim equally sound—*qui serius solvit, minus solvit*—he who pays too late, pays less. Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition."

In *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 369, the Court said:

> "At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation, within the meaning of the Constitution of the United States."

In *Northern Pacific Ry.* v. *Wall*, 241 U. S. 87, 91, it was said:

> "As this court often has held, the laws in force at the time and place of the making of a contract, and which affect its validity, performance and enforcement, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

Some of the many other decisions to the same effect are the following:

Sturgess v. *Crowninshield*, 4 Wheat. 122.
Wolff v. *New Orleans*, 103 U. S. 358.

Antoni v. *Greenhow*, 107 U. S. 769.

Seibert v. *Lewis*, 122 U. S. 284.

McGahey v. *Virginia*, 135 U. S. 662, 693, 694.

Louisiana ex rel. Hubert, Receiver, v. *Mayor and Council of New Orleans*, 215 U. S. 170.

Hendrickson v. *Apperson*, 245 U. S. 105.

W. B. Worthen Co. v. *Thomas*, 54 S. Ct. Rep. 816.

These acts not only impair the obligation of contract, but deprive the bond holders of their property without due process, which is forbidden by the Fourteenth Amendment to the Federal Constitution. They take away the right to the remedies given by the old laws for the enforcement of the collection of the assessments, and leave no other equally effective remedies. This right is property in the constitutional sense. *Pritchard* v. *Norton*, 106 U. S. 124, 132. While the Fourteenth Amendment does not guarantee any particular form of remedy, it does guarantee the preservation of a substantial right to redress by some effective procedure. *Gibbes* v. *Zimmerman*, 290 U. S. 326. As we have seen, the new laws so obstruct the remedies for enforcing the collection of the assessments as to give no substantial right to redress.

The following are other cases holding that statutes making substantial changes in remedies are in conflict with the Fourteenth Amendment:

Bradley v. *Lightcap*, 195 U. S. 1;

Stearns v. *Minnesota*, 179 U. S. 223;

Duluth & Iron Range Ry. Co. v. *St. Louis County*, 179 U. S. 302.

In many cases this Court has held unconstitutional legislation changing the remedies for foreclosing mortgages and other liens.

In *Bronson* v. *Kinzie*, 1 How. 311, a state law provided that the equitable estate of the mortgagor should not be extinguished for twelve months after sale on foreclosure and prevented any sale unless two-thirds of the appraised value of the property should be bid therefor. This was held to violate the contract clause.

In the Bronson case it was said that the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of the security by rendering the property unsalable for anything like its value. This same principle would apply to Act 129 repealing the law giving the purchaser at the sale the right to possession without liability for rents, pending redemption. The fact that the purchaser would have possession without accountability for rents pending the period of redemption would certainly encourage a person to buy at the sale. The absence of the right would certainly render the property unsalable for anything like its value.

In *McCracken* v. *Hayward*, 2 How. 608, this Court held unconstitutional a statute which provided that an execution sale should not be made of the property unless it would bring two-thirds of its value according to the opinion of three householders.

In *Gantly's Lessee* v. *Ewing*, 3 How. 707, a statute requiring a sale for not less than one-half of the appraised price was held unconstitutional.

In *Howard* v. *Bugbee*, 24 How. 461, a statute extending for two years the right of redemption from foreclosure sale was held to conflict with the Constitution.

In *Louisiana* v. *Police Jury*, 111 U. S. 716, it was held that when a contract is made with a municipal corporation upon the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation so as to deprive the holder of the contract of all adequate and efficacious remedy is within the inhibition of the Constitution.

In *Barnitz* v. *Beverly*, 163 U. S. 118, a statute giving the right of redemption on foreclosure sale where no right previously existed or which extended the period of redemption beyond the time formerly allowed was held void as to a sale executed before its passage.

There are many decisions of the Supreme Court of Arkansas in harmony with the above decisions of this court. In *Burt* v. *Williams*, 24 Ark. 91, it was said:

> "The Constitution prohibits the passage of any law that impairs the obligation of contracts, and it is well settled that any law which destroys the remedy for enforcing a contract, or so obstructs the remedy as to make the contract valueless, or greatly lessen its value, impairs its obligation. A right without a remedy to declare it, is not a valuable right; a contract that cannot be enforced has no legal obligations; and one that was enforcible by law when made, but which cannot be compelled to be performed by the law for its performance being repealed, or being so changed or clogged as materially to diminish its worth, has suffered from unconstitutional legislation."

In *Oliver* v. *McClure*, 28 Ark. 555, the court said:

> "A state law, passed subsequently to the execution of a mortgage, which declares that the equitable

estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents a sale, unless two-thirds of the amount at which the property has been valued by appraisers shall be bid therefor (as applied to prior contracts), is within the clause of the tenth section of the first article of the Constitution of the United States, which prohibits a state from passing a law impairing the obligation of contracts."

In *Robards* v. *Brown*, 40 Ark. 423, the court held void a statute requiring mortgaged lands to sell for two-thirds of the appraised value and giving the right of redemption where no right existed before. In this case, the court said (page 427):

"* * * The Legislature cannot, under the guise of legislating upon the remedy, in effect, impair the obligation of contracts. The idea of right and remedy are so intimately associated as often to be inseparable. Now any legislation which deprives a party of a remedy substantially as efficient as that which existed at the making of the contract, does impair its obligatory force. * * *

"If the law applies to antecedent mortgages, it takes away from the creditor the means of enforcing his mortgage, which he had expressly contracted for, viz: to subject the fee in the lands to an unconditional and absolute sale, for the purpose of paying his debt, and substitutes, in lieu of this, the conditional power to sell, if a certain price can be obtained; and even then the estate of the purchaser is subject to be defeated by the return of the purchase-money, with ten per cent interest, before the expiration of the year. Common sense and observation teach us that the right to sell at once the entire fee simple in lands and to give the purchaser immediate possession is worth more and will be more likely to produce the mortgage debt than the restricted right of selling a conditional interest in the lands. Thus the law, if extended to previous mortgages, would curtail and materially embarrass the cred-

itor's right to subject the entire interest of the debtor in the property to the payment of the debt intended to be secured. * * *"

The Robards case was followed in *Hudgins* v. *Morrow*, 47 Ark. 515, which held that a statute giving the right to redeem could not apply to a mortgage executed before its passage.

In *Chicago Title & Trust Co.* v. *Hagler Special School District No. 27*, 178 Ark. 443, 12 S. W. (2d) 881, the court held unconstitutional an act which detached material portions of the territory from the school district after it had issued bonds. The Court said:

"* * * It is equally well settled, however, that it is a plain violation of our own Constitution as well as of the Constitution of the United States to enact a law which has the effect of impairing the obligation of a contract. * * *

"The territory comprising Hagler Special School District, and the revenue for school purposes derived from it at the time the bonds were issued and sold, constituted the principal protection of the bondholders. It was a material part of the contract that such creditors should have the right to have a school tax levied and collected as provided by law upon the whole territory embraced in the school district as it then existed. Of course, this court has recognized that the Legislature, in the exercise of its powers to change the boundaries of school districts, might make immaterial changes which could not in any sense impair the vested rights of the bondholers; but it could not take away material portions of the district, as was done in this case, and thereby seriously impair or affect injuriously the vested rights of the bondholders, who, as creditors of the district, had the right to have the territory remain as it was at the time the bonds were issued. * * *"

In *Adams* v. *Spillyards*, 187 Ark. 641, 61 S. W. (2d) 686, the court held unconstitutional Act 57 of the Arkansas Legislature of 1933 which changed the remedies for foreclosure of mortgages by providing that the real property securing the loan should be considered to be the value of the loan made, irrespective of the amount which might be realized from the sale; that the plaintiff should not be entitled to a decree of foreclosure unless he should file a stipulation that he would bid the amount of the debt, interest and costs; that where a sale of property had been made under a foreclosure decree which had not been confirmed, the chancellor should inquire into the amount that the property sold for, and should not confirm the sale until after a hearing, and the Supreme Court should not review the findings of the chancellor on appeal even though no fraud were shown. The court held that the case was ruled by the Arkansas case of *Robards* v. *Brown, supra,* and the decisions of this Court in *Bronson* v. *Kinzie, supra; McCracken* v. *Hayward, supra; Gantly's Lessee* v. *Ewing, supra,* and *Howard* v. *Bugbee, supra.*

The real test of the substantiality of the changes is whether the new legislation diminishes the value of the contract. If its effect is to postpone payment or of means to enforce payment or takes away incentives for prompt payment then it diminishes the value and is in conflict with the Constitution. No reasonable person could deny that these new laws so change the remedies given under the old laws as to make the bonds, if not valueless, of greatly lessened value.

Under the decisions above cited, we submit that these three Acts must be held void as to bonds issued and sold be-

fore they were passed unless they come within the rule in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398 (the Minnesota moratorium mortgage case), to the effect that the constitutional prohibition against the impairment of obligation of contracts and the taking of property without due process do not make it impossible for the state in the exercise of its reserved power to enact laws to protect the interests of the people during the present economic emergency *on certain conditions and limitations.* That they do not come within this rule, we shall endeavor to show later.

IV.

REASONING AND AUTHORITIES OF THE DECISION OF THE SUPREME COURT OF ARKANSAS

A.

The Principal Opinion

Let us first consider the principal opinion (R. 15). After stating the case and saying the only question presented is the constitutionality of Acts 278, 252 and 129, it concludes with the following:

> "An inspection of the acts of 1933 called in question, will disclose that they are entirely remedial in their nature and do not attempt to take away any of the vested rights of appellants such as their lien and right to foreclose same, but simply reduce the penalty and extend the time required to foreclose in case of default and to redeem from a sale and are, in our judgment, reasonable changes to meet the exigencies of the depression and to give property owners a reasonable time and opportunity to save their homes. The constitutionality of Act 278 of 1933 was attacked from every conceivable angle in the case of *Sewer Improvement District No. 1 of Wynne* v. *Delinquent Lands,* 188 Ark.

738, 68 S. W. (2d) 80, and this court upheld the act. In deciding that case the authorities were fully reviewed, and it is unnecessary to review them again. Suffice it to say that the case referred to governs and controls the instant case. There is no difference between the three acts in tenor and effect, so the reasoning as to the validity of Act 278 is applicable to Acts 252 and 129."

The Wynne opinion is, therefore, the one which must be looked to for the reason for this opinion. The Wynne case (decided February 5, 1934, only a few months before the instant case) was also a suit to foreclose delinquent assessments, and Act 278 was held constitutional by a divided court, chiefly on the authority of the Blaisdell case, *supra*.

(For the convenience of the court, the majority and dissenting opinions in the Wynne case are printed on pp. 52 to 74 of the Appendix.)

The Wynne opinion in effect recognizes the rule laid down by the cases we have cited above when it says:

"The rule seems to be well settled, by all American decisions on the subject, that the remedy of enforcing contracts, in existence at the time of its execution, cannot be taken away by subsequent legislation. On the other hand, subsequent legislation affecting the remedy only which leaves a valid remedy in effect does not impair the obligations of contract, and is therefore valid."

It says that there must be taken into consideration the economic conditions existing when Act 278 was enacted and then referring to the Blaisdell case, says:

"Act 278 of 1933 comes within the spirit and letter of the Minnesota statute and the holding of the Supreme Court of the United States upholding it. The court there held that, since the Minnesota statute af-

fected the remedy only and gave to the mortgagee the rents and profits accruing during the statutory delay, it took from the mortgagee no substantial right.

"It is true that Act 278 does not, in terms, give the mortgagee rents and profits accruing from the property during the pendency of the suit, but this right may be invoked by the mortgagee under other legislation in this State.

"Chapter 150, Crawford & Moses' Digest, vests full power and authority in the chancery courts of the State to appoint receivers in all equitable proceedings, when it is shown that the trust property is in danger of being lost, removed or materially injured, or that the conditions of the trust have been broken and the property is probably insufficient to discharge the mortgage debt. Thus it will be seen that the mortgagee, by invoking the provisions of chapter 150 of Crawford & Moses' Digest, has the legal status of a mortgagee under the Minnesota statute."

The act upheld in the Blaisdell case found and declared that an economic emergency existed. It provided for relief through court proceedings from foreclosure of mortgages and execution sales of real estate by postponement of sales and extension of periods of redemption; that it was to remain in effect during the emergency only and in no event beyond May 1, 1935; that the court could extend the time of redemption from foreclosure sale for such time as it might deem equitable; that the court should determine the reasonable value of the income on the property or if it had no income then the reasonable rental value, and direct the mortgagor to pay all or a reasonable part of such income or rental value toward the payment of taxes, insurance, interest and principal of the mortgage; and that prior to the expiration of the extended period of redemption the

court could revise the terms of the extension as changed circumstances might require.

In *W. B. Worthen Company, Trustee, et al.*, v. *Thomas*, 54 S. Ct. Rep. No. 15, p. 816, decided May 28, 1934, this Court held void under the contract clause, Act 102 of 1933 of the Arkansas Legislature exempting the proceeds of life insurance policies from liability or seizure under judicial process as applied to a debt owing and reduced to judgment before its enactment notwithstanding a legislative determination of an emergency. The opinion clearly points out the distinctions between that case and the Blaisdell case as follows, and we think the same distinction applies to the instant case:

> "The Legislature sought to justify the exemption by reference to the emergency which was found to exist. But the legislation was not limited to the emergency and set up no conditions apposite to emergency relief.
>
> "We held in *Home Building & Loan Association* v. *Blaisdell, supra*, page 434, *et seq.* of 290 U. S., that the constitutional prohibition against the impairment of the obligation of contracts did not make it impossible for the State, in the exercise of its essential reserved power, to protect the vital interests of its people. • • • We said that the constitutional prohibition should not be so construed as to prevent *limited and temporary interpositions* with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood or earthquake, and that the State's protective power could not be said to be nonexistent when the urgent public need demanding relief was produced by other and economic causes. But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the State to adopt

as its policy the repudiation of debts or the destruction of contracts or the *denial of means to enforce them.* We held that when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be *limited by reasonable conditions appropriate to the emergency.* * * * Accordingly, in the case of Blaisdell, we sustained the Minnesota mortgage moratorium law in the light of the *temporary and conditional relief* which the legislation granted. We found that relief to be reasonable from the standpoint of both mortgagor and mortgagee, and to be *limited to the exigency* to which the legislation was addressed.

"In the instant case, the relief sought to be afforded is neither *temporary nor conditional.* In placing insurance moneys beyond the reach of existing creditors, the Act contains no *limitations as to time, amount, circumstances, or need.* We find the legislation, as here applied, to be a clear violation of the constitutional restriction." (Italics ours.)

Thus this Court says a statute which conflicts with the contract or due process clauses can be held valid under the reserved power of the State to protect its people in time of stress *only* when the relief to be given by the statute is both *temporary and conditional*, and the statute contains *limitations* as to *time, circumstances* and *need.*

Let us examine Acts 278, 252 and 129 to see if they come within this rule. Only Act 252 makes a legislative finding of the economic emergency. They are not temporary in character, but are permanent. The court is not given the power to determine the necessity for extension nor to require the owner to pay a reasonable rental for possession pending suit or redemption. Act 129 even repeals the former law giving the right of possession to the purchaser

pending redemption, without accountability for rents. They do not give the court power to revise the extension as changed circumstances might require. Even though the property owner may be fully able to pay he can take advantage of the long delay and the court is powerless to prevent it.

Therefore, the relief which these acts give is neither temporary nor conditional. They contain no limitations but are absolute. In this respect they differ from the Minnesota statute passed upon in the Blaisdell case and are similar to the Arkansas statute passed upon in the Thomas case.

The majority opinion in the Wynne case says that Act 278 comes within the spirit and letter of the Minnesota statute and the holding in the Blaisdell case, since that statute affected the remedy only and gave the mortgagee rents and profits during the statutory delay, and that while Act 278 does not, in terms, give the mortgagee the rents and profits, this right may be invoked under Chapter 150 of Crawford & Moses' Digest, which vests power in chancery courts to appoint receivers in equitable proceedings.

The opinion therefore claims that only one of the conditions in the Minnesota statute can be applied here—the provision that the mortgagee shall have rents and profits.

The court thus did not give effect to the requirement that such an act be temporary, which the Blaisdell and Thomas cases hold is one of the essentials to its validity.

It also did not give effect to the requirement that the statute give the court power (a) to determine the need for

the extension and (b) to revise the extension as changed circumstances might require, which is also essential.

Judge McHaney in his dissenting opinion in the Wynne case, reported in 68 S. W. (2d) 84 (Appendix p. 62), pointed out the fact that the majority opinion did not give effect to the limitations stated in the Blaisdell opinion, and emphasized by Chief Justice Hughes in the Thomas case. Judge McHaney says:

> "In the opinion of the majority it appears that the decision of the Supreme Court of the United States in the recent case of *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, was of controlling influence. As I read this case it has no bearing on this and is not at all in point. The Minnesota statute, there under consideration, was temporary in character, expiring of its own terms May 1, 1935, and purported to be an emergency measure for a short period of time. There the court was given the power to determine the necessity for the delay and to require the owner to pay a reasonable rental for retaining possession in the event delay was decreed. Here the measure is permanent in character and it is no answer to say that the Legislature may repeal it when the occasion for its enactment has ceased to exist. And no right to possession or to the rents and profits is accorded during the more than two years delay, in addition to the four years allowed for redemption. The act of 1915 (Section 5642 of Crawford & Moses' Digest) heretofore referred to, did give the right of possession, but the same Legislature that enacted Act No. 278 of 1933 also repealed the statute giving such right by Act No. 129."

We submit that the absence of these conditions is sufficient to take these acts out of the holding in the Blaisdell case, even though it could be admitted that a receiver could be appointed under Chapter 150.

We respectfully submit, however, that this chapter was never intended to and cannot apply in suits to foreclose improvement district assessments. In fact it has never been invoked in any improvement district proceedings. In five cases the Arkansas Supreme Court has held that a receiver for an improvement district could not be appointed unless the statutes under which it was organized authorized it. See *Paving District No. 5* v. *Fernandez*, 142 Ark. 21, 217 S. W. 795; *Martin* v. *Hargrove*, 149 Ark. 383, 232 S. W. 596; *South Miller County Highway District* v. *Dorsey*, 174 Ark. 553, 297 S. W. 833; *Jefferson Bank of St. Louis* v. *Little Red River Levee District*, 186 Ark. 1048, 57 S. W. (2d) 805. It is evident from these cases that the court did not think this chapter had any application at all to improvement districts.

It is true Section 8612 of this chapter authorizes a receiver in an action to foreclose a mortgage. Judge McHaney in his dissenting opinion clearly shows that this section could not apply in an improvement district foreclosure, when he says:

> "If, as indicated in the majority opinion, an improvement district may have a receiver appointed for all delinquent property in the district under the authority of Chapter 150 (Sec. 8600 *et seq.*), Crawford & Moses' Digest, I think they have dug up a bunch of snakes that will be harder to kill than the job St. Patrick had in Ireland. That chapter, dealing with the powers of courts of equity to appoint receivers has been the law since January 15, 1857, except sections 8611 to 8615, inclusive, which are parts of the Civil Code, and up to this time it has never been invoked in a proceeding to collect delinquent taxes in improvement districts. Moreover, it could not be invoked under the provisions of Section 8612 relating to mortgaged property, as the court has jurisdiction to appoint a receiver

under this section only 'where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the conditions of the mortgage have not been performed, and that the property is probably insufficient to discharge the mortgage debt.' Undoubtedly the kind of mortgage referred to is the ordinary mortgage given to secure a personal indebtedness and not a lien upon the benefits assessed against property in an improvement district."

The Supreme Court of Arkansas has held that Sec. 8612 means what it says and that before the plaintiff in a mortgage foreclosure proceeding can have a receiver appointed he must show that the property will be insufficient to discharge the debt. See *Price* v. *Dowdy*, 34 Ark. 285, and *Weis* v. *Neel*, 14 S. W. 1097.

It would be impossible in an improvement district foreclosure to show that the property was insufficient to pay the annual assessments due. The annual assessments in improvement districts are seldom if ever over ten per cent of the total assessed benefits; in some cases they are 6 2/3 per cent and in others 5 per cent, depending on the length of time the bonds are to run. The annual assessment in this district is 6 2/3 per cent since the bonds run 15 years (R. 6). Under Sec. 12 of Act 64 of 1929, the annual assessment can never be more than twenty-five per cent. The annual assessment in any district can thus be only a small part of the value of the property. Therefore, it would be impossible in a suit to foreclose delinquent assessments to prove the property was not worth the amount sued for. The property owner could thus successfully resist the appointment of a receiver.

It is evident that the kind of mortgage intended by Chapter 150, as said by Judge McHaney, is the ordinary real estate or chattel mortgage to secure a personal debt and not an assessment lien. We have been unable to find any cases in other states where receivers were ever appointed in suits to foreclose delinquent assessments.

Furthermore, even if a receiver could be appointed under this chapter, it could not give the bondholders a remedy equal to the one they had under the old laws. The receiver could not be appointed until suit was filed. *District No. 21, United Mine Workers of America* v. *Bourland,* 169 Ark. 796, 277 S. W. 546. Under Act 278 suit cannot be filed until six months after the assessments are due, as we have shown. By that time, the bonds would be in default. With such a result it cannot be said that Chapter 150 would give the bondholder a remedy equal to the one he was solemnly assured he had by the laws in existence when he bought the bonds.

We respectfully submit that the principal opinion is not supported by the case of *Home Building & Loan Association* v. *Blaisdell, supra,* and is contrary to the decisions of this Court cited above, particularly *W. B. Worthen Company* v. *Thomas, supra,* and the former decisions of the Supreme Court of Arkansas.

B.

The Concurring Opinion

Let us now consider the concurring opinion (R. 17). This states that it agrees with all that is said in the prin-

cipal opinion, and then proceeds to give additional reasons why Acts 252 and 129 of 1933 are valid.

1. As to Act 252, it says that Section 5644 of Crawford & Moses' Digest, giving five years in which to redeem, was not amended by Section 2 of Act 359 of 1925 to make the period two years, as contended by us, and that since Act 252 shortens the period to four years, appellants cannot complain.

Section 2 of Act 359 reads as follows:

> "Hereafter all persons shall have the right to redeem from the sale for taxes of road, drainage, levee of (or) other improvement districts at any time within two years from the date when such lands are sold by the Commissioner making the sale, and not thereafter; Provided that the provisions of this section shall not apply to property which shall have become delinquent or have been forfeited prior to the passage of this Act."

The concurring opinion says:

> "Section 2 of Act 359 of 1925 needs no interpretation. It provides that it is applicable to 'road, drainage, levee of (or) other improvement districts.' Had it been intended to apply to paving, sewerage, water and such municipal districts, the Legislature could and would have so said in plain language. The only conceivable reason asserted as to its applicability to municipal improvement districts is 'of (or) other improvement districts' but this phrase has reference to other improvement districts of the same kind as those specifically enumerated. The rule of *ejusdem generis* has ever been applied by us under such circumstances." (Citing cases.)

Some of the cases cited hold that the rule of *ejusdem generis* applies, others that it does not. In none were the

circumstances identical with those here. Of course, whether the rule will apply must depend upon the facts of each particular case.

We respectfully submit that there is in Arkansas and can be only one kind of road or drainage or levee district, and hence there can be no "other improvement districts of the same kind," as said in the above quotation from the opinion. Each of the enumerated words exhausts its class or genus. In other words, they left nothing which could be called *ejusdem generis*. Municipal improvement districts in Arkansas include curbing and guttering, paving, sidewalk, waterworks, sewer and electric light districts. They are not the same kind as road, drainage or levee districts. Since each enumerated word exhausts its class, the general words would not mean anything if the statute is construed not to apply to municipal districts. Surely the Legislature had some purpose in using them. In *United States* v. *Mescall*, 215 U. S. 26, this court, referring to the rule, quoted from the Supreme Court of Missouri, as follows:

> " 'But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. * * * Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the *genus* there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by

> the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose.'"

If there is any doubt as to the construction of Act 359 of 1925, then this Court can consider the generally accepted construction and a construction, if any, given by a later Act. This is well settled by many decisions of this Court. *Mitchell* v. *U. S.*; 9 Pet. 711; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309; *1st National Bank of St. Louis* v. *Missouri*, 263 U. S. 640, 658; *Maynard* v. *Elliott*, 283 U. S. 273.

That it was generally accepted in Arkansas that Act 359 applied to municipal districts and that the Legislature of 1933 so construed it, we submit is evidenced by the following statement in Section 3 of Act 252 of 1933, fixing the redemption period at four years:

> "It is hereby ascertained as a fact that the present law does not provide an adequate period of redemption from land sales for delinquent taxes in municipal improvement districts and by reason thereof many landowners affected are now threatened with the loss of their homes and lands and therefore an emergency exists and this Act should be immediately in full force and effect from and after its passage, the public peace, health and safety requiring it."

At the time the Legislature used these words, the only law affecting the redemption period that could possibly apply to municipal districts was either Section 5644, (the five year law) or Act 359, (the two year law). These words certainly show the Legislature intended to extend the time for redemption. It must then follow that it construed Act 359 to apply to municipal districts. Otherwise, the effect of

Act 252 would be to reduce the time, absolutely contrary to its purpose.

In addition to fixing the redemption period at four years, Act 252 also fixes the interest to be paid on the purchase price on redemption at six per cent, which repeals the ten per cent provided for in Section 5644 of Crawford & Moses' Digest, heretofore referred to. This part of Act 252 we submit is unconstitutional for the reasons above stated.

2. The concurring opinion says concerning Act 129 of 1933:

> "The language of the section, 'The court may approve the sale subject to the right of redemption and immediately upon such approval the purchaser shall have the right to possession, etc.', clearly vests in the chancery courts of the state a discretionary power in the approval of all sales effected in such courts by municipal improvement districts. It is common knowledge that such sales are not approved in many instances until the time for redemption has expired. No one would assert that the chancery courts could be subjected to mandamus under this section of the statute and compelled to approve a report of sale prior to the expiration of the period of redemption. Such being the law, appellant took no vested right by reason of said section and cannot complain at its repeal."

The section referred to is a part of Section 5642 of Crawford & Moses' Digest, giving the purchaser the right to possession without accountability for rents pending redemption, which Act 129 of 1933 purports to repeal.

The Supreme Court of Arkansas in a long line of decisions has held that it is an abuse of discretion for a court arbitrarily to refuse to confirm a judicial sale in a reason-

able time in the absence of fraud or other irregularity, even when the sale is for an inadequate consideration. The leading case is *George* v. *Norwood*, 77 Ark. 216, 91 S. W. 557, decided in 1905, where the court said:

> "Courts have adopted, as a wise public policy, the rule that confidence in the stability of judicial sales should be maintained, so that competitive bidding may be encouraged by the assurance that, in the absence of fraud or misconduct, the highest bidder will be accepted as the purchaser of the property offered for sale. And, while it is often said that the accepted bidder at such a sale acquires no independent rights until the sale be confirmed by the court, and that the court may exercise a discretion in either confirming or rejecting the sale, yet this discretion must be exercised according to fixed rules, and not arbitrarily, and the bidder has the right to insist upon its exercise in this manner only. He can insist that his purchase be not set aside by the court upon reasons which are condemned."

Other decisions to this effect are:

Banks v. *Board*, 66 Ark. 490, 51 S. W. 830;

Wells v. *Lenox*, 108 Ark. 366, 159 S. W. 1099;

Curtsinger v. *Burkeen*, 126 Ark. 94, 189 S. W. 673;

Hawkins v. *Wood*, 179 Ark. 845, 18 S. W. (2d) 371;

Marten v. *Jirkovsky*, 174 Ark. 417, 295 S. W. 365;

Free v. *Harris*, 181 Ark. 644, 27 S. W. (2d) 510;

Federal Land Bank v. *Ballentine*, 186 Ark. 141, 52 S. W. (2d) 965;

Adams v. *Spillyards*, *supra*.

The rule applies to foreclosure of assessments in improvement districts. *Nash* v. *Delinquent Lands*, 111 Ark. 158, 163 S. W. 1147.

Adams v. *Spillyards, supra,* as we said above, held unconstitutional Act 57 of the Arkansas Legislature of 1933 which made drastic changes in the laws for the foreclosure of mortgages. Referring to Act 57, the court in that case said:

> "Sections 3 and 4 undertake to change the rule many times announced by this court, and of long duration, that the court cannot refuse to confirm a judicial sale for mere inadequacy of consideration except for fraud, unfairness or some other inequitable conduct of the sale. See *Marten* v. *Jirkovsky,* 174 Ark. 417, 295 S. W. 365; *Free* v. *Harris,* 181 Ark. 647, 27 S. W. (2d) 510. This was the law as to all existing mortgages, became a part of them, and related to a substantial remedy to collect the debts for which they were given."

The Arkansas Supreme Court has thus long been committed to the doctrine that the chancery court cannot arbitrarily refuse to confirm a valid sale and this was the law when the bonds of this district were issued and sold.

If the court could not be compelled by mandamus to approve a report of sale prior to the expiration of the period of redemption this could only be for the reason that mandamus does not lie where there is an adequate remedy by appeal. Under numerous decisions of the Arkansas Supreme Court the purchaser at the sale by virtue of his purchase becomes in effect a party to the proceedings and is entitled to appeal from the denial of a motion filed by him to have the sale confirmed. The right of appeal by the purchaser was recognized and given the same effect as appeal by a party named in the record in *Polk* v. *Afflick,* 168 Ark. 903, 271 S. W. 962; *Robertson* v. *McClintock,* 86 Ark. 255, 110 S. W. 1052; and *George* v. *Norwood, supra.*

If the chancellor should refuse to act on a motion to confirm the sale, then a writ of mandamus could issue to compel him to act. This has always been the rule in Arkansas and is universal. In *Jones* v. *Adkins*, 170 Ark. 298, 280 S. W. 389, decided in 1926, it was said:

> "In the case of *Gunn's Admr.* v. *County of Pulaski*, 3 Ark. 427, we held, quoting syllabus: 'Where an inferior tribunal has a discretion, and proceeds to exercise it, that discretion cannot be controlled by mandamus; but, if it refuses to act or exercise the discretion, a mandamus lies to put it in motion.' That rule has been consistently adhered to by this court from that day until the present time."

The Gunn case was again followed in *Cantley* v. *Irby*, 186 Ark. 492, 54 S. W. (2d) 286, decided in 1932.

It is also, of course, the rule in this Court. *Hudson* v. *Parker*, 156 U. S. 277, 288.

To hold that the court could arbitrarily refuse to confirm a valid sale until the time for redemption had expired would defeat the very purpose of the law giving the purchaser the right to possession without accountability for rents pending redemption.

We respectfully submit that the construction given Act 359 of 1925 for the first time by the concurring opinion is wrong and that the holding in effect that the chancery court could arbitrarily refuse to confirm a sale until the time for redemption had expired is contrary to the decisions of the Supreme Court of Arkansas in effect when the bonds of this district were issued and sold.

V.

CONCLUSION

Of course, on this appeal, this Court is not bound by the holding of the Arkansas Supreme Court that under Chapter 150 of Crawford & Moses' Digest a receiver could be appointed to collect rents in a suit to foreclose delinquent assessments; that Section 2 of Act 359 of 1925 did not amend Section 5644 of Crawford & Moses' Digest to provide two years for redemption; and in effect that the chancery court could arbitrarily refuse to confirm a valid sale until the period of redemption had expired.

The well-settled rule on this point is stated as follows in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 360, where the cases were thoroughly reviewed:

> "When contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved, then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued."

We submit that the following from the dissenting opinion in the Wynne case is a sound statement of the law and a complete answer to the statements in the opinions in the instant case to the effect that these acts affect only the remedy and have nothing to do with the contract:

> "It must be admitted as a fundamental right of both the district and its bondholders to pay and have paid the obligations of the district at the time and in the manner provided in the contract between them. This can only be accomplished by prompt collection of

taxes on assessed benefits which were so fixed and bond maturities so arranged that the annual collections would meet the bond interest and maturities. Under the new act, No. 278, unless all the property owners, or substantially all, voluntarily pay their improvement taxes, bonds, and coupons will necessarily become delinquent, as they are not required to pay for a period of two and one-half years before sale, with four years for redemption after sale, and then a penalty of only 3 per cent (not per annum) is permitted for nonpayment. *This not only affects the remedy, but, in my opinion virtually destroys it,* and is therefore unconstitutional." (Italics ours.)

We respectfully submit that as to the bonds of this district and others issued and sold before their passage, Acts 278, 252 and 129 of the Arkansas Legislature of 1933 conflict with the contract and due process clauses of the Federal Constitution and are void, and that this case should be reversed.

Respectfully submitted,

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APPENDIX

Crawford & Moses' Digest of the Statutes of Arkansas:

Section 5642. *Right of tax purchaser to possession.* In all sales made by commissioners under decrees of chancery courts for foreclosure of delinquent special assessments in drainage, levee, and bridge districts, improvement districts in cities and towns, and in all special assessment districts of every kind, the court may approve the sale subject to the right of redemption, and immediately upon such approval the purchaser shall have the right to possession of the lands and premises so sold and may have process therefor, and such purchaser while so in possession shall not be accountable for rents upon redemption.

Section 5644. *Right of redemption.* Any person, firm or corporation, or the heirs, assigns or legal representatives of any person, firm or corporation, who would have been permitted to redeem had the sale been by the collector for State and county taxes, or who was in possession under color of title at the time of said decree of sale, shall have the right to redeem said sale at any time within five years, by payment to the clerk of the chancery court as ex-officio commissioner of the purchase price at such commissioner's sale together with interest thereon at the rate of ten per centum per annum upon lands having a rental value at any time during the period allowed for redemption, and at the rate of twenty per centum per annum on lands having no rental value, together also with all costs of redemption, and any taxes and special assessments meantime paid by the

purchaser, together with the interest on such at the rate of ten per centum per annum.

Section 5673. *Penalty.* If any assessment, made under this act, shall not be paid within the time mentioned in the notice published by the collector, the collector shall add thereto a penalty of twenty per centum, and shall at once return a list of the property on which the assessments have not been paid to the board of improvement as delinquent.

Section 5678. *Default decree.* Summons shall be issued, and the defendant shall be required to appear and respond within five days after service; and upon default a decree shall be rendered against such property for the amount of such assessment, penalty and cost and an attorney's fee.

Section 5679. *Constructive service.* If the sheriff, or other officer, to whom the writ may be directed, shall return that the defendant is not to be found in his county, or if the owner is stated in the complaint to be unknown, service shall be made by affixing a copy of the summons to the property assessed, or to some part thereof, for fifteen days, and by publishing a copy of the summons in some daily or weekly paper, published in the city for one insertion, and the cause shall be made ready for hearing within fifteen days after such publication, and a decree shall be rendered as in case of actual service.

Section 5684. *Condemnation decree—sale.* The suit shall be brought in the name of the board of improvement, and, in its decree of condemnation, the court shall direct that, if the sum adjudged shall not be paid within ten days, the property shall be sold by a commissioner, appointed

for that purpose, upon twenty days' notice. Provided, that only so much of the property shall be sold as will pay the assessment, costs and penalty, and no more.

Section 5686. *Appeals—advancement of cause.* If any appeal be taken from any such decree as is mentioned in Sections 5678, 5683 and 5684, the Supreme Court shall advance the cause on its docket, and shall hear and decide the cause at as early a day as practicable.

Section 5687. *Time of filing transcript.* Said transcript shall be filed in the office of the clerk of the Supreme Court within twenty days after the rendering of the decree appealed from.

Section 5688. *Contents of transcript.* In taking such appeal the appellant shall only include in the transcript so much of the record as relates to his own lands.

Section 5689. *Limitation of appeal.* No appeal shall be prosecuted from any decree after the expiration of the twenty days herein granted for filing the transcript in the clerk's office of the Supreme Court.

ACT No. 278, ACTS OF ARKANSAS, 1933, PAGE 868

AN ACT to Amend Sections 5673, 5678, 5679, 5684 and to Repeal Sections 5686, 5687, 5688 and 5689 of Crawford & Moses' Digest of the Statutes of Arkansas.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Section 5673 of Crawford & Moses' Digest of the Statutes of Arkansas is hereby amended to read as follows:

5673 Penalty. If any assessment made under this act shall not be paid within ninety days after the time mentioned in the notice published by the Collector, the Collector shall add thereto a penalty of three per centum, and shall ninety days thereafter, return a list of the property on which the assessments have not been paid, to the board of improvement as delinquent.

Section 2. Section 5678 of Crawford & Moses' Digest of the Statutes of Arkansas is hereby amended to read as follows:

5678 Default decree. Summons shall be issued and the defendant shall be required to appear and respond within six months after service; and upon default a decree shall be rendered against such property for the amount of such assessment and penalty.

Section 3. Section 5679 of Crawford & Moses' Digest of the Statutes of Arkansas is hereby amended to read as follows:

5679. Constructive service. If the sheriff, or other officer, to whom the writ may be directed, shall return that the defendant is not to be found in his county, or if the owner

is stated in the complaint to be unknown, service shall be made by affixing a copy of the summons to the property assessed, or to some part thereof, for six months, and by publishing a copy of the summons in some daily or weekly paper, published in the city, for one insertion, and the cause shall be made ready for hearing within six months after such publication, and a decree shall be rendered as in case of actual service.

Section 4. Section 5684 of Crawford & Moses' Digest of the Statutes of Arkansas is hereby amended to read as follows:

5684. Condemnation decree—sale. The suit shall be brought in the name of the board of improvement, and, in its decree of condemnation, the court shall direct that, if the sum adjudged shall not be paid within twelve months, the property shall be sold by a commissioner, appointed for that purpose, upon six months' notice.

Section 5. Sections 5686, 5687, 5688 and 5689 of Crawford & Moses' Digest of the Statutes of Arkansas are hereby repealed.

Section 6. All laws and parts of laws in conflict with this act are hereby repealed. This act being necessary for the public peace, health and safety, an emergency is hereby declared to exist and this act shall take effect and be in force from and after its passage.

Became a law without the Governor's signature, March 30, 1933.

This bill having remained with the Governor twenty days and the General Assembly not being in session it has become a law this the 30th day of March, 1933.

ED F. MCDONALD,
Secretary of State.

ACT No. 252 OF THE ACTS OF ARKANSAS, 1933, PAGE 790

AN ACT Providing a Period of Redemption from Land Sales for Delinquent Taxes in Municipal Improvement Districts.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. It is here provided that the owner of any land hereafter sold for any delinquent taxes or assessments of any municipal improvement district existing for any purpose whatever, shall have the right to redeem same from such sale at any time thereafter within four years by the payment of the sale price thereof and six (6%) per cent interest per annum thereon to the purchaser or his assignee.

Section 2. All laws and parts of laws in conflict herewith are hereby repealed.

Section 3. It is hereby ascertained as a fact that the present law does not provide an adequate period of redemption from land sales for delinquent taxes in municipal improvement districts and by reason thereof many landowners affected are now threatened with the loss of their homes and lands and therefore an emergency exists and this Act should be immediately in full force and effect from and after its passage, the public peace, health and safety requiring it.

This bill having remained with the Governor twenty days and the General Assembly not being in session, it has become a law this the 30th day of March, 1933.

ACT No. 129, ACTS OF ARKANSAS, 1933, PAGE 375

AN ACT to Repeal Section 5642 of Crawford & Moses' Digest.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Section 5642 of Crawford & Moses' Digest is hereby repealed.

Section 2. It is hereby ascertained and declared that a large proportion of the property owners of the State are in a precarious condition financially, that a great number of foreclosure proceedings have been instituted, or are about to be instituted, by Commissioners of various improvement districts for foreclosure of delinquent assessments, and decrees will be entered approving sales under such foreclosures resulting, during the period of redemption, in the loss of possession by the owners thereof, of countless homes and many parcels of land, whereby many people will be deprived of shelter and a means of livelihood, thereby endangering the peace, health and safety of a multitude of the citizens of the State, and an emergency is therefore hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval by the Governor.

March 21st, 1933.

ACT 359, ACTS OF ARKANSAS, 1925, PAGE 1058

AN ACT to Facilitate the Redemption From Tax Sales of Part of Tract Sold.

Sections:

1. Redemption from improvement tax sale, portion of land sold, fees, penalty, reassessments.
2. Two years to redeem for all such taxes.
3. Repealing clause.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. When a portion of a tract of land sold for general taxes or for any improvement district taxes extended by the County Clerk on the County tax books is claimed by any person who desires to redeem the same, such person may apply to the County Assessor, setting forth in writing his claim thereto and demanding that the Assessor make a separate assessment upon the tract of land described by the claimant showing what portion of the General taxes or of the local improvement taxes for which the land is forfeited is properly applicable to the portion of the land sought to be redeemed. The Assessor shall, within two weeks after the application is filed with him, file with the County Clerk a certificate in which he shall justly apportion the delinquent general or local improvement taxes between the portion of the land described in the demand of the complainant and the remaining portion of the land. For his services in so doing the claimant shall pay him the sum of One ($1.00) Dollar. In case he fails to file his certificate within the time prescribed he shall be subject to a penalty of twenty-five ($25.00) Dollars.

Said certificates shall be recorded by the County Clerk in a book to be kept by him and called the Tax Apportionment Book, and the County Clerk shall write opposite the description of the lands in the assessment books or local improvement assessment book the words, "See Tax Apportionment Book." For each case in which he fails to do so, he shall be subject to a penalty of twenty-five ($25.00) Dollars.

Any person interested in said lands, either as the purchaser at the sale for general or local improvement taxes or claiming the remaining portion of the land or any part thereof, may at any time before the expiration of the period for redemption of the said land, upon paying to the proper officer the sum necessary to redeem the portion of lands claimed by him, file suit in the Chancery Court to review the justness of the apportionment made by the assessor; and if he prevails in said suit, the Court shall make a decree charging the lands of the defendant with the excess of taxes paid by the plaintiff, which charge shall be the first lien on said property. If the first redemption is made less than three months before the expiration of the period of redemption, the remaining parties interested in the lands shall have a period of three months from the time of such redemption in which to bring the suit herein provided for; but such three months shall not extend their time for redeeming.

The assessing officers of any improvement district may make a reassessment of the benefits annually, and in any such reassessment they may correct defective descriptions, and where tracts of land have been assessed as a whole such tract may be divided according to their ownership at

the time of the reassessment. Such reassessment shall be made, advertised and equalized in the same manner and only subject to attack within the same period of time as the original assessment of benefits.

Section 2. Hereafter all persons shall have the right to redeem from the sale for taxes of road, drainage, levee of other improvement districts at any time within two years from the date when such lands are sold by the Commissioner making the sale, and not thereafter; Provided that the provisions of this section shall not apply to property which shall have become delinquent or have been forfeited prior to the passage of this Act.

Section 3. All laws and parts of laws in conflict herewith are hereby repealed, and this Act shall take effect and be in force from and after its passage.

Approved. April 1, 1925.

IN THE SUPREME COURT OF ARKANSAS

SEWER IMPROVEMENT DISTRICT NO. 1 OF WYNNE v. DELINQUENT LANDS.

(Reported in 188 Ark. 738, 68 S. W. (2d) 80.)

Opinion delivered February 5, 1934.

JOHNSON, C. J. This appeal brings into question the constitutionality of Act 278, page 868, of the General Acts of 1933. The trial court held the act constitutional and valid, and this appeal is prosecuted therefrom.

Act 278 of 1933, in effect, provides: "Section 1 amends § 5673 of Crawford & Moses' Digest by giving to property owners, within the district, 90 days in which to make payment of past-due assessments instead of 30 days, as provided in § 5673 of Crawford & Moses' Digest"; also it reduces the penalty for nonpayment from 20 per cent. to 3 per cent.

Section 2 of said act gives to property owners six months in which to answer the complaint, after suit is instituted, instead of 5 days, as provided in § 5678 of Crawford & Moses Digest.

Section 3 of said act gives to nonresident land owners six months after publication of notice to file answer, instead of fifteen days, as provided in § 5679 of Crawford & Moses' Digest.

Section 4 of said act gives to the chancery court wherein the suit is pending, power to grant to the property owner twelve months in which to pay the judgment or decree rendered, instead of ten days, as provided in § 5684 of Crawford & Moses' Digest.

Section 5 of said act is the emergency clause, and directly repeals §§ 5686, 5687, 5688 and 5689 of Crawford & Moses' Digest. The sections of Crawford & Moses' Digest directly repealed by said act are to the following effect: "5686 provides for the advancement of all causes pending in the Supreme Court wherein the foreclosure of assessments of benefits are involved." Section 5687 of Crawford & Moses' Digest gives to any aggrieved owner appealing only twenty days in which to file an authenticated transcript of the proceedings. Section 5688 of Crawford & Moses' Digest restricts the record on appeal to such matters as may affect the property of the one so appealing. Section 5689, Crawford & Moses' Digest, restricts the right of appeal to those who perfect the transcript of the record within twenty days from the date of rendition of the decree.

The contention urged is that Act 278 of 1933 violates § 17 of Article 2 of the Arkansas Constitution of 1874 and § 10 of Article 1 of the Constitution of the United States, which sections provide against impairment of contract. Stated another way, appellant contends that the State Legislature is without authority to amend or repeal the sections of the digest referred to for the reason that they were the law at the time the district bonds were issued and sold.

In considering the important question here presented, it is necessary that we take into consideration the economic conditions existing in this State at the time Act 278 of 1933 was enacted. The conditions sought to be alleviated should be considered as a part of the enactment itself. At the time of the enactment, Arkansas was in the midst of the worst depression any member of this court has ever experienced.

Thousands of home owners in the State were without employment, and the bare necessities of life, because thereof, were denied them and their families. All real property in this State was without market value, the net result being that in many instances a five or ten thousand dollar home was sacrificed at public sale for from ten per cent. to twenty-five per cent. of its intrinsic value. The charitable spirit of the members of the Legislature must be commended by all, as the gravity of the question considered by them cannot be gainsaid or denied.

It must be remembered that all political power is inherent in the people, and the State Legislature has the absolute right to invoke this power in all cases except in such as may be prohibited by constitutional mandate. Section 1 of Article 2 of the Arkansas Constitution of 1874 provides: "All political power is inherent in the people, and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish same in such manner as they may think proper."

Section 22 of the same article provides: "The right of property is before and higher than any constitutional sanction; * * *."

It will thus be seen that, by constitutional mandate, all political power in this State is reserved in the people, except such as may be expressly prohibited by constitutional mandate.

In the *State* v. *Chester Ashley*, 1 Ark. 513, this court expressly held: "A State Legislature can exercise all power that is not expressly or impliedly prohibited by the Constitution; for whatever powers are not limited or restricted

they inherently possess as a portion of the sovereignty of the State."

The constitutional doctrine thus announced has been consistently followed by this court up to the present time. *Bush* v. *Martineau*, 174 Ark. 214, 295 S. W. 9. All legislative enactments are presumed to be constitutional and valid until it is otherwise made to appear. *Patterson* v. *Temple*, 27 Ark. 202.

"Neither should a statute be declared unconstitutional unless there is a clear incompatibility between the act and the Constitution." *Eason* v. *State*, 11 Ark. 481.

"All doubts should be resolved in favor of the constitutionality of a statute." *Duke* v. *State*, 56 Ark. 485, 20 S. W. 600; *Graham* v. *Nix*, 102 Ark. 277, 144 S. W. 214.

It is the long established policy of this court to declare no act of the Legislature unconstitutional save with greatest caution. *State* v. *Moore*, 76 Ark. 197, 88 S. W. 881.

And "A statute will not be declared unconstitutional unless no doubt exists on the question." *Stillwell* v. *Jackson*, 77 Ark. 250, 93 S. W. 71.

There is a line of demarcation between the inherent reserved rights of the people and those prohibited by constitutional mandate. The question always arises upon which side of the line the enactment may fall. The question should be approached with the gravest consideration, and all cases bearing on the question should be most seriously considered. Section 10 of Article 1 of the Constitution of the United States and § 17 of Article 2 of this State should not be considered as all inclusive. The dignity of these provisions rises no higher than the reserve power in the people.

From the synopsis of the act herein given it necessarily appears that Act 278 of 1933 affects only the remedy in the enforcement of contracts, and has nothing to do with the contract itself. Therefore the question narrows down to one of remedy. The rule seems to be well settled, by all American decisions on the subject, that the remedy of enforcing contracts, in existence at the time of its execution, cannot be taken away by subsequent legislation. On the other hand, subsequent legislation affecting the remedy only which leaves a valid remedy in effect does not impair the obligations of contract, and is therefore valid. In re *Sturgis* v. *Crowninshield*, 4 Wheat. 122. In the case just referred to, the Supreme Court of the United States, on the question here under consideration, said: "The distinction between the obligation of a contract, and the remedy given by the Legislature to enforce that obligation has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."

The same court, in *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, said: "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights."

In *Antoni* v. *Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91, 96; 27 L. Ed. 468, the Supreme Court of the United States said: "In all such cases the question becomes therefore

one of reasonableness, and of that the Legislature is primarily the judge."

A number of decisions of the Supreme Court of the United States are urged upon us as decisive of the question here presented. Among them are *Bronson* v. *Kinzie*, 1 How. 311, 11 L. Ed. 143. The act there under consideration required the property to be appraised and to bring not less than two-thirds of its appraised value upon sale. Act 278 of 1933 has no such requirement. This is entirely sufficient to differentiate the Bronson case from the one here under consideration. *McCracken* v. *Hayward*, 2 How. 608; *Gantley's Lessee* v. *Ewing*, 3 How. 707, and *Howard* v. *Bugbee*, 24 How. 461, may be likewise differentiated. In Penniman's case, 103 U. S. 714, the Supreme Court of the United States drew the line of demarcation as follows:

"The general doctrine of this court on the subject may be thus stated: In modes of proceeding and forms to enforce the contract the Legislature has the control, and may enlarge, limit or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right."

The Supreme Court of the United States seems to be unalterably committed to the rule that all sovereign states retain a measure of control over remedial process and legislation, and to safeguard the vital interests of its people. *Jackson* v. *Lamphire*, 3 Pet. 280; *Hawkings* v. *Barney*, 5 Pet. 457; *Railroad Co.* v. *Hecht*, 95 U. S. 168; *South Carolina* v. *Gaillord*, 101 U. S. 433; *Louisiana* v. *New Orleans*, 102 U. S. 203; *Red River Valley Bank* v. *Craig*, 181 U. S. 548; *Security Savings Bank* v. *California*, 263 U. S. 282. The same court is also committed to the doctrine that the mere

modification of existing remedies for enforcing contracts is not the controlling question. *Stephenson* v. *Binford*, 287 U. S. 251.

All such contracts and legislation must be read in the light of the retained sovereignty of the State. *Home Building & Loan Ass'n* v. *Blaisdell*, ms. op. Supreme Court of the United States, January 8, 1934.

Moreover, the Supreme Court of the United States is committed to the doctrine that the constitutional provision against impairment of contracts was not impaired by an amendment of the State Constitution which puts an end to a lottery theretofore authorized by the State Legislature. *Stone* v. *Mississippi*, 101 U. S. 814. To the same effect is *Douglas* v. *Kentucky*, 168 U. S. 488, and *New Orleans* v. *Houston*, 119 U. S. 265.

The same court has many times held that the respective states retain adequate power to protect the public health and the public safety. *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Chicago, B. & Q. Rd. Co.* v. *Nebraska*, 170 U. S. 57; *Texas & N. O. R. R. Co.* v. *Miller*, 221 U. S. 408; *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548. Again, in *Manigault* v. *Springs*, 199 U. S. 473, that court held that the economic interest of the State may justify the exercise of its continuing and dominant protective power, notwithstanding interference with contracts. The statute there in question was sustained upon the ground that private interests were subservient to the public right. Continuing the court there said: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such pow-

ers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

All doubts heretofore existing in reference to the retained protective power of the several states were recently removed by the decisions of the Supreme Court of the United States in the following cases: *Block* v. *Hirsh*, 256 U. S. 135; *Marcus Brow Holding Co.* v. *Feldman*, 256 U. S. 170; *Edgar A. Levy Leasing Co.* v. *Siegal*, 258 U. S. 242; and *Home Building & Loan Ass'n* v. *Blaisdell, supra.*

In the Blaisdell case, *supra*, the Supreme Court of the United States upheld the constitutionality of a Minnesota statute which gave to property owners relief during the present emergency. The attack was made there as here, that the Minnesota statute impaired the obligations of contract. The act was upheld, however, upon the expressed theory that it fell within the reserved power of the State to protect its people from disaster. The court there said: "Undoubtedly, whatever is reserved of State power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the

State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may not be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake."

Act 278 of 1933 comes within the spirit and letter of the Minnesota statute and the holding of the Supreme Court of the United States upholding it. The court there held that, since the Minnesota statute affected the remedy only and gave to the mortgagee the rents and profits accruing during the statutory delay, it took from the mortgagee no substantial right.

It is true that Act 278 does not, in terms, give the mortgagee rents and profits accruing from the property during the pendency of the suit, but this right may be invoked by the mortgagee under other legislation in this State.

Chapter 150, Crawford & Moses' Digest, vests full power and authority in the chancery courts of the State to appoint receivers in all equitable proceedings, when it is shown that the trust property is in danger of being lost, removed or materially injured, or that the conditions of the trust have been broken and the property is probably insufficient to discharge the mortgage debt. Thus it will be seen that the mortgagee, by invoking the provisions of chap-

ter 150 of Crawford & Moses' Digest, has the legal status of a mortgagee under the Minnesota statute.

Our attention has been directed to *Adams* v. *Spillyards*, 61 S. W. (2d) 686, as sustaining the contention that the act under consideration is unconstitutional and void. Such is not the effect of the case referred to. Section 1 of the act (Acts 1933, No. 57) there under consideration reads as follows:

"In any foreclosure, in any court in the State of Arkansas in which real estate is involved, the real estate securing the loan, sought to be foreclosed, shall be considered to be the value of the loan made, irrespective of the amount which may be realized from the sale of such real property."

Certainly there is no analogy between the acts in question. A mere comparison will convince any one of the many differentiations.

Since the Legislature is primarily the judge as to when it becomes necessary to exercise the sovereign right of the State for the protection of its people; and, since the act in question impairs no contractual right existing between the parties other than to affect the remedy, and this to no substantial extent, we are unwilling to hold that the Legislature was without power to enact the legislation in question.

The chancellor's views conforming to the reasons here expressed, his decree will, in all things, be affirmed.

SMITH and MCHANEY, JJ., dissent.

DISSENTING OPINION IN SEWER IMPROVEMENT DISTRICT No. 1 OF WYNNE v. DELINQUENT LANDS, REPORTED IN 68 S. W. (2d) 84

McHANEY, J., (dissenting). I regret that I cannot agree with the majority opinion in this case. It seems to me that we have departed from the ancient and modern landmarks of judicial construction and interpretation of statutes, and entered upon the sea of uncertainty—an exigency to meet what is thought to be an emergency. But emergency does not create power.

Under the law as it existed prior to the passage of Act No. 278, page 868, of 1933, property owners in municipal improvement districts had thirty days in which to pay their assessments after the date of the notice required to be given by the collector and published by him. Section 5671, Crawford & Moses' Digest. If not paid within that time, the collector was required to add a penalty of 20 per cent to the delinquents and immediately make a return of delinquents to the board of improvement. Section 5673 *Id.* The board was required straightway to bring a suit against delinquents to enforce collection of such assessments. Section 5674 *Id.* In case of personal service, which the law requires (Sec. 5677 *Id.*), defendants were given 5 days to appear and answer, and upon default a decree was required to be then rendered against the property for the amount of the assessment, penalty, costs and attorney's fee, Section 5678 *Id.* In case the defendant property owner is a nonresident or unknown, 15 days' constructive service is required before default decree. Section 5679. In case of decree for the board, property owners were given 10 days in which to pay, but if not paid in that time, the property was ordered sold

upon 20 days' notice. Section 5684 *Id.* If an appeal were prosecuted by any property owner, he was given 20 days to file his transcript with the clerk of the Supreme Court. Section 5687 *Id.* The Supreme Court was required to advance the case and determine it at the earliest date practicable, usually three weeks. So, it will be seen, that, from the time the assessment list was delivered to the collector, until a sale of the delinquent property could be had only 65 days were required in which to sell on personal service and 75 days on constructive service, in case there was no appeal to the Supreme Court, in which case only about 50 days more were required. Act No. 278, page 868, changes all this in the following particulars: Instead of thirty days for collection by the collector, the time is extended to 90 days at the expiration of which time 3 per cent penalty is added instead of 20 per cent, and instead of making an immediate return of delinquents, the collector is required to wait 90 days more to make such return. Section 1, Act No. 278. Instead of five days personal service in which to appear and answer, before default, the time is extended to six months. If no answer, default may be had at that time. Section 2, Act No. 278. Constructive service is the same. Section 3 *Id.* Instead of 10 days given in the decree after default in which to pay before sale, the time is extended to twelve months, and then upon six months' notice instead of 20 days. Section 4 *Id.* So it will be seen that the very minimum time in which to effectuate a foreclosure and sale under Act No. 278 is 900 days. The sections relating to appeals have all been repealed.

Under the statute as it existed prior to 1933, property owners had five years in which to redeem from such sales,

(Sec. 5644, Crawford & Moses' Digest) but the tax purchaser was given the right of possession from the date of confirmation until redemption without accounting for rents and profits. Section 5642 *Id.* This latter section was repealed by Act No. 129, Acts 1933, p. 375. The five-year redemption period was changed to four years. Act No. 252, Acts 1933, p. 790. The repeal of the provisions relative to speedy appeals would require all cases in the future to take the course of any other appeal. Instead of 20 days to file a transcript on appeal as given by Section 5687, six months could now be taken, and instead of advancing the case on the docket, it would take the usual course, 40 days to appellant, 30 days to appellee and 7 days for reply, or a total of 77 days before it would be subject to submission under the rules of this court after being docketed.

Now when appellant district was formed and sold bonds, the law was as heretofore stated prior to Act No. 278, and the other acts mentioned. Instead of a speedy method of enforcing payment of taxes on assessments, one which forcibly encouraged prompt payment, a slow and dilatory system is substituted, one which encourages taxpayers to become delinquent.

But the majority opinion says this "affects only the remedy in the enforcement of contracts, and has nothing to do with the contract itself." Let us see if this statement is correct. It must be admitted as a fundamental right of both the district and its bondholders to pay and have paid the obligations of the district at the time and in the manner provided in the contract between them. This can only be accomplished by prompt collection of taxes on assessed benefits which were so fixed and bond maturities so ar-

ranged that the annual collections would meet the bond interest and maturities. Under the new act, No. 278, unless all the property owners, or substantially all, voluntarily pay their improvement taxes, bonds and coupons will necessarily become delinquent, as they are not required to pay for a period of two and one-half years before sale, with four years for redemption after sale, and then a penalty of only 3 per cent (not per annum) is permitted for nonpayment. This not only affects the remedy, but, in my opinion, virtually destroys it, and is therefore unconstitutional.

This is not a new question in this court. As said in the early case of *Burt* v. *Williams*, 24 Ark. 91: "The Constitution prohibits the passage of any law that impairs the obligation of contracts, and it is well settled that any law which destroys the remedy for enforcing a contract, or so obstructs the remedy as to make the contract valueless, or greatly lessen its value, impairs its obligation. A right without a remedy to declare it, is not a valuable right; a contract that cannot be enforced has no legal obligations; and one that was enforcible by law when made, but which cannot be compelled to be performed, by the law for its performance being repealed, or being so changed or clogged as materially to diminish its worth, has suffered from unconstitutional legislation."

And in *Jacoway* v. *Denton*, 25 Ark. 625, it is said: "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertakings, and this is of course the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money, on or before a certain day. The contract binds him to pay that sum on that day, and this is its obligation."

Also in *Leach* v. *Smith*, 25 Ark. 246, it is said: "The objections to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law affects in it. Any deviation from its terms, by postponing or accelerating the period of its performance, imposing conditions not expressed in the contract, and dispensing with those which are, however minutely or immaterial in their effect upon the contract of the parties, impairs its obligation."

The above is a quotation from *Green* v. *Biddle*, 8 Wheat. (U. S.) 84, 5 L. Ed. 547, and immediately following is a quotation from *Ogden* v. *Saunders*, 12 Wheat. 256, 6 L. Ed. 606, that "it is perfectly clear that a law which enlarges, abridges, or *in any manner changes the intention resulting from the stipulation of the contract*, necessarily impairs it."

Again in *Oliver* v. *McClure*, 28 Ark. 555, this court said: "A state law, passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents a sale, unless two-thirds of the amount at which the property has been valued by appraisers shall be bid therefor (as applied to prior contracts) is within the clause of the tenth section of the first article of the Constitution of the United States, which prohibits a state from passing a law impairing the obligation of contracts."

In the recent case of *Adams* v. *Spillyards*, (Ark.) 61 S. W. (2nd) 686, 687, 86 A. L. R. 1493, after reviewing former decisions on the question of impairing the obligation of contract, this court, among other things, said: "The attack

made on the validity of the act is based on Article 1, Section 10, Constitution of the United States and Article 2, Section 17, Constitution of Arkansas, both prohibiting the State from passing any law impairing the obligation of contracts.

* * * *

"We said in *Bush* v. *Martineau*, 174 Ark. 214, 295 S. W. 9, 10, that an act of the Legislature is presumed to be constitutional and will not be held by the courts to be otherwise unless there is a clear conflict between the act and the Constitution, and that all doubt should be resolved in favor of the act. * * * It is equally well settled that if an act runs counter to the plain provisions of the Constitution, the courts should not hesitate to so declare and hold the act invalid.

"Another rule which is not open to dispute and is well settled both in this and the Supreme Court of the United States is thus stated in *Robards* v. *Brown*, 40 Ark. 423: 'The laws which are in force at the time when, and the place where, a contract is made and to be performed, enter into and form part of it. This is only another mode of saying that parties are conclusively presumed to contract with reference to the existing law.' And in *Walker* v. *Whitehead*, 16 Wall. 314, 317, 21 L. Ed. 357, it is said: 'The laws which exist at the time and place of the making of a contract, and where it is to be performed enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement; nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment. The obligation of a contract is the law which binds

the parties to perform their agreement"; any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution'."

To the same effect are the decisions of the Supreme Court of the United States. *U. S. ex rel. Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Sturgess* v. *Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Bronson* v. *Kinzie*, 1 How. 311, 11 L. Ed. 143; *McCracken* v. *Hayward*, 2 How. 608, 11 L. Ed. 397; *Port of Mobile* v. *Watson*, 116 U. S. 289, 6 S. Ct. 398, 405, 29 L. Ed. 620.

In *Port of Mobile* v. *Watson, supra*, the court said: "Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the Legislature, or if they are changed a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void."

Barnitz v. *Beverly*, 163 U. S. 118, 16 S. Ct. 1042, 1046, 41 L. Ed. 93, is a very interesting case on the subject and so much in point, I feel justified in quoting from it at length. It was there said: "Without pursuing the subject further, we hold that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.

"Let us briefly apply the conclusion thus reached to the facts of the present case.

"The plaintiff was the holder of several promissory notes, dated November 1, 1885, secured by a mortgage of the same date upon a tract of land in Shawnee County, Kansas. The mortgage contained an express waiver of an appraisement of the real estate. Default in payment having ensued, the suit was brought, praying that the mortgaged premises should be sold according to law, without appraisement, that the proceeds arising from the sale should be applied to the payment of the indebtedness due the plaintiff, and that the defendants should be forever barred and precluded of any right of redemption.

"Under the law as it existed at the time when the mortgage was made, after a foreclosure and sale of the mortgaged premises, the purchaser was given actual possession as soon as the sale was confirmed and the sheriff's deed issued. Thereafter the mortgagor or the owner had no possession, title, or right in any way to the premises.

"Under the new law the mortgagor shall have eighteen months from the date of sale within which to redeem, and, in the meantime, the rents, issues, and profits, except what is necessary to keep up repairs, shall go to the mortgagor or the owner of the legal title, who in the meantime shall be entitled to the possession of the property. The redemption payment is to consist, not of the mortgage debt, interest, and costs, but of the amount paid by the purchaser, with interest, costs and taxes.

"In other words the act carves out for the mortgagor or the owner of the mortgaged property an estate of several months more than was obtainable by him under the former

law, with full right of possession, and without paying rent or accounting for profits in the meantime. What is sold under this act is not the estate pledged (described in the mortgage as a good and indefeasible estate of inheritance, free and clear of all encumbrance), but a remainder—an estate subject to the possession, for eighteen months, of another person who is under no obligation to pay rent or to account for profits.

"The 23rd section of the act should not be overlooked, providing that real estate once sold upon order of sale, special execution, or general execution, shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem.

"Obviously this scheme of foreclosure renders it necessary for the mortgagee to himself bid, or procure others to bid, the entire amount of the mortgage debt, and thus, in effect release the debtor from his personal obligation.

"We, of course, have nothing to do with the fairness or the policy of such enactments as respects those who choose to contract in view of them. But it seems impossible to resist the conviction that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract. Where, in a mortgage, an entire estate is pledged for the payment of a debt, with right to sell the mortgaged premises free from redemption, can that be valid legislation which would seek to substitute a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for eighteen months? * * *

"When we are asked to put this case within the rule of those cases in which we have held that it is competent for the states to change the form of the remedy or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired, we are bound to consider the entire scheme of the new statute, and to have regard to its probable effect on the rights of the parties.

"It is contended that the right to redeem, granted by the new statute, only operates on the purchaser and not on the mortgagee as such. This very argument was foreseen and disposed of in *Bronson* v. *Kinzie,* [42 U. S. (1 How.) 319, 11 L. Ed. 146] where this court said:

"'It (the new act) declares that although the mortgaged premises should be sold under the decree [of the court of chancery], yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it, moreover, gives a new and like estate [which before had no existence] to the judgment creditors, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable estate in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security, by rendering the property unsalable for anything like its value. This law gives to the mortgagor and to the judgment creditors (meaning creditors other than the mortgagee) an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee

acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution.'

"The judgment of the Supreme Court of Kansas is reversed, and the cause remanded to that court, with directions for further proceedings not inconsistent with this opinion."

In the opinion of the majority it appears that the decision of the Supreme Court of the United States in the recent case of *Home Building & Loan Assn.* v. *Blaisdell*, 54 S. Ct. 231, 78 L. Ed. ___, was of controlling influence. As I read this case it has no bearing on this and is not at all in point. The Minnesota statute, there under consideration, was temporary in character, expiring of its own terms May 1, 1935, and purported to be an emergency measure for a short period of time. There the court was given the power to determine the necessity for the delay and to require the owner to pay a reasonable rental for retaining possession in the event delay was decreed. Here the measure is permanent in character and it is no answer to say that the legislature may repeal it when the occasion for its enactment has ceased to exist. And no right to possession or to the rents and profits is accorded during the more than two years delay, in addition to the four years allowed for redemption. The act of 1915 (Laws 1915, No. 43, p. 123) heretofore referred to, did give the right of possession, but the same legislature that enacted Act No. 278 of 1933 also repealed the statute giving such right by Act No. 129, p. 375. If, as indicated in the majority opinion, an improvement district may have a receiver appointed for all delinquent property

in the district under the authority of Chapter 150 (Sec. 8600 *et seq.*), Crawford & Moses' Digest, I think they have dug up a bunch of snakes that will be harder to kill than the job St. Patrick had in Ireland. That chapter dealing with the powers of courts of equity to appoint receivers has been the law since January 15, 1857, except Sections 8611 to 8615, inclusive, which are parts of the Civil Code, and up to this time it has never been invoked in a proceeding to collect delinquent taxes in improvement districts. Moreover, it could not be invoked under the provisions of Section 8612 relating to mortgaged property, as the court has jurisdiction to appoint a receiver under this section only "where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the conditions of the mortgage have not been performed, and that the property is probably insufficient to discharge the mortgage debt." Undoubtedly the kind of mortgage referred to is the ordinary mortgage given to secure a personal indebtedness and not a lien upon the benefits assessed against property in an improvement district.

It is therefore clear to my mind that Act No. 278 of 1933 is unconstitutional and void as to all contractual obligations of improvement districts created prior to the passage of said act.

I am authorized to say that Mr. Justice Smith concurs in this dissent.